# Customs Bulletin

**Regulations, Rulings, Decisions, and Notices concerning Customs and related matters**

# and Decisions

**of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade**

Vol. 22 SEPTEMBER 21, 1988 No. 37/38

*This issue contains:*



THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

## NOTICE

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# U.S. Customs Service

## *Treasury Decisions*

(T.D. 88-57)

### CONDITIONAL APPROVAL OF A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of conditional approval of a commercial gauger.

SUMMARY: Stanton Marine U.S.A., Inc., of Houston, Texas, applied to Customs for approval to gauge imported petroleum and petroleum products and organic chemicals and vegetable and animal oils in bulk and in liquid form under § 151.13 of the Customs Regulations (19 CFR 151.13). Customs has determined that Stanton Marine meets the requirements for conditional approval.

Therefore, in accordance with § 151.13(c), Stanton Marine U.S.A., Inc., 12700 Northborough Drive, Suite 600, Houston, Texas 77067, is conditionally approved to gauge the products named above in all Customs districts.

EFFECTIVE DATE: August 29, 1988.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

Dated: August 30, 1988.

JOHN B. O'LOUGHLIN,
*Director,*
*Office of Laboratories and Scientific Services.*

[Published in the Federal Register, September 9, 1988 (53 FR 35146)]

(T.D. 88–58)

## REVOCATION OF CUSTOM'S BROKER'S PERMIT FOR KEER, MAURER, INC., IN THE NEW YORK AREA BY ACTION OF LAW

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that on April 28, 1988, pursuant to section 641(c)(3), Tariff Act of 1930, as amended (19 U.S.C. 1641(c)(3)), and Part 111.45 of the Customs Regulations, as amended (19 CFR 111.45), the permit for Keer, Maurer, Inc., to conduct Customs business in the New York area was revoked.

Dated: September 1, 1988.

THOMAS P. BANNER,
(for Victor G. Weeren, Acting Director,
Office of Trade Operations)

# U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87-1455, 87-1616)

ALLIED CORP., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, AND HITACHI METALS, LTD., ET AL., VACUUMSCHMELZE GMBH, NIPPON STEEL CORP., ET AL., AND SIEMENS CAPITAL CORP., INTERVENORS/APPELLEES

*David W. Plant,* Fish & Neave, of New York, New York, argued for appellant Allied. With him on the brief were *David J. Lee, Eric M. Lee, Christopher B. Garvey* and *Robert A. Musicant.* Also on the brief were *Brian D. Forrow* and *David M. McConoughey,* Allied Corporation of Morristown, New Jersey, of counsel.

*Jean H. Jackson,* Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee ITC. With her on the brief were *Lyn M. Schlitt,* General Counsel and *James A. Toupin,* Assistant General Counsel.

*Thomas J. Macpeak,* Sughrue, Mion, Zinn, Macpeak & Seas, of Washington, D.C., argued for intervenor Hitachi. With him on the brief were *Waddell A. Biggart* and *Sheldon I. Landsman.* Also on the brief were *Alan J. Neuwirth, Michael Doherty* and *Richard Mescon,* Webster & Sheffield, of New York, of counsel.

*John D. Simpson,* Hill, Van Santen, Steadman & Simpson, of Chicago, Illinois, argued for intervenor Vacuumschmelze. With him on the brief was *Steven H. Noll.* Also on the brief were *Tom Schaumberg* and *Alice Kipel,* Howrey & Simon, of Washington, D.C., of counsel.

Thomas L. Creel, Kenyon & Kenyon, of New York, New York, argued for intervenor Nippon. With him on the brief were *Edward W. Greason, Robert T. Tobin, Philip J. McCabe, John J. Kelly, Jr.* and [Richard M. Rosati.

Appealed from: U.S. International Trade Commission.

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Before MARKEY, *Chief Judge,,* DAVIS* and ARCHER, *Circuit Judges.*

MARKEY, *Chief Judge.*

ORDER

Having reconsidered the Petition for Rehearing, the panel grants that Petition to the extent of ordering the following changes in the opinion. Accordingly,

IT IS ORDERED THAT

On page 7, in (2) change "waived" to —abandoned—; in n. 6 change "waiver" to —abandonment—.

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* Judge Davis took no part in the decision in this case.

On page 15, fourth line from the bottom (in II.), change "Waiver" to —Abandonment—; in third line from the bottom change "waived" to "abandoned".
On page 16, line 4 delete everything up to "ITC's".

Dated: August 25, 1988.

FOR THE COURT,
HOWARD T. MARKEY,
*Chief Judge*

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(Appeal No. 88–1154)

THE BRECHTEEN CO., PLAINTIFF-APPELLEE, *v.* UNITED STATES, DEFENDANT-APPELLANT

*David O. Elliott,* Barnes, Richardson & Colburn, of New York, New York, argued for plaintiff-appellee. With him on the brief was *Sandra Liss Friedman.*
*Kenneth N. Wolf,* Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellant. With him on the brief were *John R. Bolton,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.

*Judge* TSOUCASLAS.

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(Decided August 19, 1988)

Before MARKEY, *Chief Judge,* NICHOLS, *Senior Circuit Judge,* and SMITH, *Circuit Judge.*

NICHOLS, *Senior Circuit Judge.*

This appeal from a decision of the United States Court of International Trade, *Brechteen Company* v. *United States,* 677 F. Supp. 1234 (1987), requires us to determine the correct customs classification of certain collagen sausage casings imported by appellee. The competing tariff paragraphs are as follows:

1. As classified by Customs and urged by appellant United States here:

Item 790.47 TSUS
Sausage casings not specially provided for, whether or not cut to length.
Item 790.45—Of cellulosic plastics materials * * *.
Item 790.47—Other ..... 4.2 ad val.

2. As classified by the Court of International Trade:

Item 190.58 TSUS

> Intestines, weasands, bladders, tendons, and integuments, not specially provided for, including any of the foregoing prepared for use as sausage casings..... Free

For reasons that will be shown, we agree with the Customs Service and differ with the trial court. In our view, the disputed merchandise was properly classified under Item 790.47 as "Sausage casings * * * other." Accordingly, we reverse.

## BACKGROUND

The trial court found that the merchandise was produced as follows before importation, and as imported, met this description:

> The imported casings are made from collagen, which is a fibrous type of protein, common to all connective tissue, hides (skin), organs and like structures in the animal body. The evidence discloses that according to component material, sausage casings are categorized as natural if they are prepared from animal (swine) intestine. Artificial sausage casings may be produced from paper, cellulose, plastic, cotton, nylon, or polyethylene, and cannot be consumed. The collagen casings in issue are edible and while not considered "natural," are made from animal as opposed to non-animal material.
>
> The process of producing these collagen casings begins with cattle hide after the epidermal layer (outer portion of the skin) is removed by the tanneries. Underneath this layer lies the corium layer, which is further split in two.[1] It is the inner part of this "hide split" that is the basic raw material of these casings. The hides are then washed to eliminate the lime treatment used by the tanneries to remove the hair; if edible casings are sought the hide is treated with lime again. The hides are rewashed, placed in an acid solution to produce swelling which promotes water absorption, cut and ground into a doughy mass (slurry), diluted with water, and homogenized. The acid does not appear in the final product. The doughy mass of collagen is then extruded: pressed through a rotater to create a tube, then heat cured, and humidified. Finally, the product is cut, tied, shirred, and packaged. The production of edible casings includes the addition of glycerol (to retain moisture) and cellulose (to reduce friction).
>
> The process takes up to approximately three weeks to complete. These imported edible collagen casings have been manufactured since the 1950's and exported to the United States since the 1960's. It does not appear to be in dispute that this, or substantially similar methods, are the only ones in existence for producing sausage casings from cattle hide. If hide other

[1] Corium is the layer of the mucous membrane corresponding to the dermis: the sensitive vascular layer of skin consisting of fibrous connective tissue. *Webster's Third New Int'l Dictionary* (1961).

> than from cattle was used, it would also have to be split and extruded. [References to transcript pages have been omitted.]

677 F. Supp. at 1235.

There is no dispute as to these findings being, for the most part, accurate. Compare the date of first importation, however, with the description of the imported merchandise and its mode of production in *Brecht Corp.* v. *United States*, 25 CCPA (Customs) 9, 11, *cert. denied*, 302 U.S. 719 (1937). The parties agree the issue we must decide is one of law: which tariff item fits the merchandise so described. It is only necessary to add a *Webster's Third New Int'l Dictionary* (1966) definition of collagen:

> An insoluble fibrous protein that occurs in vertebrates as the chief constituent of the fibrils of connective tissue (as in skin and tendons) * * *.

The court also added a description of how other "natural" sausage casings under Item 190 are made: they need not concern us here except that they also involve manufacturing processes and collagen. The court referred to the involved sausage casings, however, as "artificial" and the sausage casings otherwise obtained, and concededly under Item 190.58 are "natural."

The trial court further referred to the same dictionary's definition of "integument"—

> 1. Something that covers or encloses.
>
> 2. An external coating or investment as * * * b. an enveloping layer, membrane, or structure.

It could have gone on to note that the same definition quotes as an example of actual use of the word "integument" an author who calls the calfskin cover of a book the book's "integument." Evidently that skin was "integument" twice: first of the animal, later of the book. Thus, the sausage casing might be integument of the sausage so far as the dictionary takes us.

## Discussion

The court's thoughtful and exhaustive discussion appears to state two propositions: (1) That Item 190.58 describes *eo nomine* the merchandise at bar in "clear meaning" or "plain language." (2) Even if, notwithstanding this, we resort to legislative history, that history here is inconclusive and unclear, and nothing can be found in it to alter or modify the import of the plain language. We take up these propositions in order, and with all respect, we show that neither of them is true.

1. It is curious that, with all the discussion we have had of late as to the impropriety of going past plain language to consider possibly contradictory legislative history, there is little discussion of how we are to recognize plain language when we see it. It certainly seems

appropriate to go past our possibly subjective notions of what words mean to check against recognized dictionaries of the language. On the other hand, if words are really and truly plain, it ought not to be necessary to establish their meaning by recourse to technical or scientific dictionaries where definitions contrary to common speech may often be found. Here, a much relied on proof of the "plain meaning" argument is this: if merchandise such as the instant imports are not "integuments—prepared for use as sausage casings"—there is no known product in actual trade that would be. It appears to us, however, that one who must resort to this kind of negative inference concedes a lack of "plain meaning," the more so as it is a very weak negative inference here because the "plain language" clearly imports that the intestines, weasands, bladders, etc., are designated under Item 190.58, even if not prepared at all, and the words "any of the foregoing prepared * * *," does not import a belief by Congress that *all* of them are in fact so prepared.

The greatest difficulty in the way of the "plain language" argument is, however, that according to the "plain language" the prepared articles, sausage casings, must also still be intestines, weasands, etc. It is certainly possible, given the differences in manufacturing techniques, that an integument may have become a new and different article, having another name, character, and use, so that it is no longer an integument, as an intermediate stage to becoming a sausage casing.

Why sausage casings from integuments via collagen are "artificial," and sausage casings from intestines, etc., are "natural," is also a disturbing fact left hanging in the air unexplained under our "plain meaning" analysis.

On the other hand, the fact that there are two TSUS items dealing with sausage casings *eo nomine,* not one, and that one applies if the other doesn't, is a fact relevant to use of "plain meaning" analysis. It suggests at once as does the "not specifically provided for" language, that Congress may have disregarded the possibility of an ambiguity because it knew that court decisions or legislative history would be available that would make interpretations easy, so it could legislate two classifications of sausage casings without making clear which was which.

None of the above is intended to show under what item the involved merchandise is properly classifed. It is only intended to show that the issue is not suited to "plain meaning" analysis, and that recourse to court interpretation and legislative history thus is necessary. Otherwise, a decision by us would be largely guesswork.

2. The growing mistrust of legislative history as exemplified in committee reports has illustrations in *Hart* v. *United States,* 585 F.2d 1025 (Ct. C1. 1978), and *United States* v. *Canadian Vinyl Industries, Inc.,* 555 F.2d 806, 64 CCPA (Customs) 97 (1977). Legislative history may be viewed, as there, to be an attempt often only by staffers, in any case not by the whole Congress, to enact laws with-

out meeting the constitutional requirements for valid legislation and without placing the material in the statute books where ordinary citizens can take guidance from them. Such mistrust has no grounds when the legislative history consists of comparing a former statute, with an amended or reenacted version, and judicial interpretation of the former statute which shows why it was changed. When Congress has thus spoken twice, comparison of its two versions is a reliable guide, not subject to the vagaries of staffers.

The Tariff Act of 1930 had a provision which remained law until TSUS superseded it in 1963. Paragraph 1755 was a free list item and it provided:

> Par. 1755—Sausage casings, weasands, intestines, bladders, tendons, and integuments, not specially provided for * * *.

Paragraph 1655 of the 1922 Act was the same. It might have been supposed that the term "Sausage casings" in that arrangement comprised all forms of the article of whatever material prepared. However, in *J.E. Bernard & Co.* v. *United States*, 17 CCPA (Customs) 398 (1930), a predecessor of this court held that casings for sausages, made of a "vegetable parchment" were not sausage casings under Par. 1655, quoting a dictionary definition defining sausage casings as made from the "cleaned and prepared entrails of * * * [animals]."

In *United States* v. *Pacific Butchers Supply Co.*, 22 CCPA (Customs) 355 (1934), the court held that silk sausage cases were not included in Free List Par. 1755 because they were not made from the cleaned and prepared entrails of animals. As the Tariff Act of 1930 had become law since the *Bernard* case, the court held that Congress had adopted and ratified the *Bernard* case interpretation.

In *Brecht*, the court had before it merchandise apparently identical with that of our present case, and made the same way, or with variations not material. The court denied it placement on the free list citing the two previous cases above mentioned.

It drew the distinction between natural and artificial sausage casings we have already found made again in the present case, and held that the sausage cases then before it were artificial, obviously because not made from the entrails of animals. Par. 1655 under the 1922 Act, and Par. 1755 under the 1930 Act, both designated items other than entrails: not only are integuments not entrails, neither are tendons and weasands. It seems obvious that their continued presence on that list had nothing to do with their being raw material for sausage casings. Actually in *Brecht* the court referred to prior legislative history in which the sausage casings and the following group were in and out of dutiable provisions dealing with various kinds of meat products.

The CCPA of that day would seem to have in these cases allowed rather short shrift to the "plain language" doctrine and to its customs corollary: an *eo nomine* designation will include all forms of

the article. *Nootka Packing Co.* v. *United States*, 22 CCPA (Customs) 464 (1935), which doctrine, however, as stated in *Nootka* at 470, allowed an exception for contrary legislative intent. That is probably why *Nootka* was not cited: a contrary legislative intent was considered shown.

The case of Par. 1755 is fairly typical of the way practice under the Tariff Act of 1930 developed, leading to a situation where persons not having legal training, *e.g.*, ordinary customs officers, customs brokers, or importers, could not read the Tariff Schedules with any confidence they would be held to mean what they said. This is precisely the problem the TSUS was intended to correct, as we show *infra*. It was therefore inevitable that Par. 1755 was selected as one of those that needed to be cleaned up, and the changes actually made in that paragraph must be understood and interpreted as intended for that end. The TSUS was intended to be itself revenue neutral in the numerous changes it made in the 1930 Act's classification scheme, and nomenclature, but to afford a framework on which future changes, as *e.g.*, by trade agreements, could be hung with some confidence such changes would actually have the intended result.

The effect of the cited CCPA decisions was that not all but only some sausage casings were sausage casings within the meaing of Par. 1755. The others were not specifically provided for at all, but only by basket clauses. The TSUS revisions were two: one altered the wording of Par. 1755 to show in Item 190.58 that ony some sausage casings were covered there, *i.e.*, those prepared from intestines, etc., or any of them. The other sausage casings, ignored in the 1930 Act except for the operation of a basket clause, were in TSUS also provided for *eo nomine* in Items 790.45 and 790.47, so that no one need suppose any one item covered all sausage casings.

The changes are manifestly for the purpose of making the free list item mean what it says, and not be a trap for the unwary. They do not overrule the case law; rather they reaffirm it. An immaterial change in a tariff paragraph does not rebut the presumption of legislative ratification based on reenactment of a provision that has been construed by a court of last resort. *United States* v. *D.H. Grant & Co.*, 47 CCPA (Customs) 20 (1959); *United States* v. *Astra Trading Corp.*, 44 CCPA (Customs) 8 (1956):

> Congress having reenacted paragraph 1428 in substantially the same language, we are not of the opinion that the addition to the enumerated exemplars of the two additional exemplars is such a modification or an indication of a contrary legislative intent as to take this case out of the general rule.

44 CCAP at 14

For application of the legislative ratification doctrine, the CCPA considered itself a court of last resort in customs matters in view of the small number of customs cases reviewed in the Supreme Court.

*Werner G. Smith Co.* v. *United States,* 40 CCPA (Customs) 90, 97 (1952).

We think and hold, therefore, in view of the foregoing, the reenactment of Par. 1755 as Item 190.58, reflected a legislative adoption of the *Brecht* case holding and its incorporation into the TSUS. The change in the treatment of sausage casings had no bearing on the *Brecht* case because it did not reflect, expressly or by implication, any intent to add to the free list any sausage casings the *Brecht* case had excluded therefrom. Rather, it reflected an intent to reword the statute so it stated the result of the *Brecht* case, but in more understandable terms.

Since the court in *Brecht* had before it for classification merchandise virtually identical in mode of manufacture abroad, and in condition as imported, with the merchandise before us, *Brecht* is authority binding on us. *South Corp.* v. *United States,* 690 F.2d 1368, 1 Fed. Cir. (T) 1, 215 USPQ 657 (1982). The holding in *Brecht* is that such merchandise is outside Par. 1755. We are therefore constrained to apply the doctrine of legislative ratification and thus to hold it is outside Item 190.58, by reason of which it is "other" sausage casings under Item 790.47.

The trial court cites *United STates* v. *Canadian Vinyl Industries, Inc.,* 555 F.2d 806, 810, 64 CCPA (Customs) 97, 104 (1977), for the proposition that a "recasting" of Par. 1755 must be intended to change its meaning. Apparently a "recasting" is any change, as the extent of the one actually made is not discussed. The citation is to an opinion by the present writer, sitting by designation on the CCPA. At the page cited, it holds that an amendment to eliminate from TSUS Item 771.40 the words "and unsupported" from the item reading:

> Film, strips, and sheets, all the foregoing which are flexible and unsupported:

effected a material and broadening change despite a statement in legislative history that the deleted words were surplusage. The opinion goes on to caution against using such dubious material to overcome a clear meaning. It was a foretaste of the currently fashionable "clear meaning" doctrine, and quotes *Cass* v. *United States,* 417 U.S. 72, 83 (1974):

> "In resolving ambiguity we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process."

555 F.2d at 811, 64 CCPA at 105.

The amendment to Item 771.40 had a direct bearing on the issues to be decided, whereas we find in the decision under review no recognition of a need to show any logical nexus between an amendment to a statute, and the issues to be decided. By that view, any changes in a statute in course of reenacting it would destroy the utility as a

precedent of any judicial decision construing the former language, however devoid of connection to one another the judicial decision and the amendment may be. Moreover, the holding in *Canadian Vinyl* deals only with apparently mistaken information supplied in legislative history: it does not say—and in view of other CCPA authority, could not have said—that any change in a statute requires disregard of any judicial decision interpreting the former statute.

It remains to consider the legislative history of the TSUS items to be construed, the part, that is, that does not reflect actual enactments by Congress or decisions construing them by a court of last resort. The TSUS had its gestation in the Customs Simplification Act of 1954, Pub. L. No. 768, 83d Cong., 2d Sess. The purpose of that Act was as stated in its name, and Title I, § 101, was the most important step then taken to simplify the United States Customs. It directed the Tariff Commission (now the International Trade Commission) to study all the classification laws, including the dutiable and free lists, and propose changes to make them logical in arrangement and adapted to the changes since 1930 in the kinds of merchandise imported, eliminate anomalies and illogical results, and simplify tariff classification.

This required performance of a gigantic task if it was to be done properly, and the fact it was assigned to and mostly done by, one man, Russel Shewmaker, and done extremely well, makes it a unique monument to the capabilities of the old-time United States civil servant. He had help and support by the Classification Section of the Bureau of Customs to which he had previously belonged. Hearings were required if any rate changes were to be proposed. In the event, Mr. Shewmaker found it expedient and necessary to publish tentative drafts and wait for interested parties to read them and tell him when something was wrong. Sometimes this process sufficed to identify and correct mistakes, but at other times it did not. Considering the paucity of resources, except Mr. Shewmaker, assigned full time to the task, the infrequency of error is remarkable, but its possibility is never to be disregarded when interpretation is attempted.

The Tariff Commission perfected its study and transmitted it to Congress on November 15, 1960. Besides the suggested new schedules, later called the TSUS, the submission included explanatory notes commenting on the new items, and these are properly and commonly dealt with and applied by lawyers and judges as legislative history. That on Item 190.58 read in part:

> Item 190.58 is based on paragraph 1755. The term "sausage casings" in paragraph 1755 has been construed to cover only casings made of animal integuments. In order to avoid further uncertainty, the provision has been revised.

Such a construction would be absurd, and no evidence has ever surfaced to show anyone having authority to do so ever made such a holding. The government construes it as meaning that to the Con-

gress of that day, "integuments" meant "entrails." This would appear to be another imaginative leap. It is more rational to learn from *Cass* v. *United States, supra,* that in analyzing legislative history, we must never forget the possibility of a simple mistake. Despite the efforts of the dictionary to set everyone straight, the world is doubtless full of people who do not know what an "integument" is. It was not the Congress that supposed an integument was an entrail. It was just the author of that note. If that supposition had been correct, the note would have been informative. It is absurd to attribute the mistake of one staffer—one hopes not Shewmaker—to the entire Congress, but is equally absurd to throw out the entire legislative history, root and branch, because of one natural mistake. The note is most eloquent in what it does not say. It does not say there was any intent to overrule *Brecht,* and the note on Item 790.45 shows there was no such intent. Item 790.45 was not, at that time, divided into Items 790.45 and 790.47; however, the study said:

> Item 790.45 covers sausage casings other than those provided for in item 190.58 * * *. Principal kinds of casings included are those * * * and those made from hide splittings, currently dutiable by virtue of the similitude provisions of paragraph 1559 at the same rate applicable to casings made of cellulose under paragraph 31.

In *Brecht,* the merchandise was described in the opinion as made from hide splits. Thus, it is clear the Tariff Commission advised the Congress to acquiesce in *Brecht* so far as it excluded the involved merchandise from the free list, at any rate, and to provide a new home for it in a new item.

The trial court further quotes an inexplicable passage from the S. Rep. No. 530, 89th Cong., 1st Sess. 11, *reprinted in* 1965 U.S. Code Cong. and & Admin. News 3416, 3425. It appears to be hopelessly confused, but it offers no excuse for disregarding real legislative history. This committee report purports to construe the TSUS which was made law by Presidential Proclamation 3598, effective in 1963, as authorized in the Tariff Classification Act of 1962, 76 Stat. 72, Pub. L. No. 87–456. It would therefore be an attempt by a committee of Congress to usurp the function of the courts in construing what a previously enacted statute means if read as a guide to the statute itself; it was meant, however, as a mere introduction to amendments then proposed and presumably better considered. The Supreme Court only just the other day again instructed the lower courts to disregard this kind of supposed legislative history. *Pierce* v. *Underwood,* —— U.S. ——, slip op. at 13 (June 27, 1988). We need therefore be concerned with it no further.

The parties have devoted much of their briefs to discussion whether "integuments" alone or as modified by the words "prepared for use as sausage casings," has a meaning such as supports the result each party contends for. We have already held it does not as a matter of plain language. We doubt if, independent of case law,

it is capable of a satisfactory interpretation. The controlling case authority, *Brecht,* devotes no attention to any such issue and is, as we have noted, primarily a holding that only some, not all, sausage casings attain the free list, for reasons independent of whether they are integuments. Following the lead of *Brecht,* we disregard that issue too.

CONCLUSION

The imported merchandise is dutiable under Item 790.47 as "Sausage casings * * * other." The judgment of the Court of International Trade is reversed and the cause is remanded with directions to dismiss the complaint.

**REVERSED AND REMANDED**

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(Appeal No. 88–1188)

BMT COMMODITY CORP. AND DELCA DISTRIBUTORS INC., PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE, CODFISH CORP., DEFENDANT

*Jerry P. Wiskin,* Freeman, Wasserman & Schneider, of New York, New York, argued for plaintiffs-appellants. With him on the brief were *Jack Gumpert Wasserman* and *Patrick C. Reed.*

*Judith M. Czako,* Office of General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for defendant-appellee. With her on the brief were *Lyn M. Schlitt,* General Counsel and *James A. Toupin,* Assistant General Counsel.

Appealed from: U.S. Court of International Trade.
*Judge* RESTANI.

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(Decided August 9, 1988)

Before SMITH, *Circuit Judge,* BENNETT, *Senior Circuit Judge,* and MAYER, *Circuit Judge.*

PER CURIAM.

BMT Commodity Corporation (BMT) appeals from the judgment of the Court of International Trade in *BMT Commodity Corp.* v. *United States,* 667 F. Supp. 880 (Ct. Int'l Trade 1987) (Restani, J.). In this judgment the court sustained the International Trade Commission's (Commission) decision "that 'the establishment of an industry in the United States is materially retarded by reason of imports of dried heavy salted codfish from Canada, which the Department of Commerce has determined are sold at less than fair value.' " *Id.* at 881. BMT contests whether the Commission applied the proper legal standard, whether the Commission's procedures were understood by the court, whether the Commission's determination was supported by substantial evidence, and whether the

Court of International Trade correctly ruled that plaintiffs should have contested adverse confidential evidence during the Commission's proceedings.

We find no justifiable basis for overturning the decision of the trial court and we see no need to reiterate its published analysis, which we adopt. Accordingly, we affirm on the basis of that opinion.

**AFFIRMED**

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(Appeal No. 88–1224)

FAR EASTERN DEPT. STORE, U.S.A. INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

*Steven B. Lehat,* of Glad, White & Ferguson, Los Angeles, California, argued for plaintiff-appellant.

*Barbara M. Epstein,* of the Commercial Litigation Branch, Department of Justice, New York, New York, argued for defendant-appellee. With her on the brief were *John R. Bolton,* Assistant Attorney General, *David M. Cohen,* Director, and *Joseph I. Liebman,* Attorney in Charge.

Appealed from: U.S. Court of International Trade.

*Judge* WATSON.

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(Decided August 11, 1988)

Before SMITH, *Circuit Judge,* BENNETT, *Senior Circuit Judge,* and MAYER, *Circuit Judge.*

PER CURIAM.

The judgment of the United States Court of International Trade, Slip Op. 87–138, 678 F. Supp. 892 (1987), is affirmed on the basis of the court's opinion, which we adopt.

**AFFIRMED**

# United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

*Chief Judge*

Edward D. Re

*Judges*

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

*Senior Judges*

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

*Clerk*

Joseph E. Lombardi

## Notice of Amendments to the Rules of the United States Court of International Trade

The court, on July 28, 1988, approved certain amendments to the Rules of the United States Court of International Trade, which are to become effective November 1, 1988. The rules affected by these changes are: Rules 4, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28, 30, 31, 32, 34, 35, 36, 37, 38, 41, 43, 44, 44.1, 45, 46, 49, 50, 51, 53, 54, 55, 56, 60, 62, 63, 65, 65.1, 69, 71, 74, 75, 77, 80, 81, 82 and 89.

Copies of the amendments were transmitted to the following sources for publication:

United States Customs Service
Bureau of National Affairs, Inc.
Clark-Boardman Company
Invictus Publishing Corporation
The Lawyers Co-operative Publishing Co.
LEXIS Federal Databases
Matthew Bender & Co.
Oceana Publications, Inc.
Rules Service Company
Shepard's/McGraw-Hill
West Publishing Company

If you have obtained a copy of the court's Rules from a commercial publisher, you may wish to communicate with that publisher to determine when the amendments will be available.

A copy of the amendments is available for examination in the court's Library and the Case Management Section.

Dated: August 8, 1988.

Joseph E. Lombardi,
*Clerk of the Court.*

# United States Court of International Trade

Amendments to Rules 4, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 20, 23, 24, 25, 26, 27, 28, 30, 31, 32, 34, 35, 36, 37, 41, 43, 44, 44.1, 45, 46, 49, 50, 51, 53, 54, 55, 56, 60, 62, 63, 65, 65.1, 69, 71, 74, 75, 77, 80, 81, 82 and 89

July 28, 1988

Effective Date:
November 1, 1988

### *Amendments to Rule 4*

Rule 4 is amended as follows:

Rule 4. Service of Summons and Complaint

(a) *Summons—Service by the Clerk.* * * *

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(5) * * *

(b) *Summons and Complaint—Service by Plaintiff.* * * *

(c) *Service.* * * *

(1) * * *

(2) * * *

(d) *Summons and Complaint—Person To Be Served.* The summons and complaint shall be served together as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and complaint to [~~him~~] **the individual** personally or by leaving copies thereof at [~~his~~] **the individual's** dwelling house or usual place of adobe with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and the complaint to an agent authorized by appointment or by law to receive service.

(2) * * *

(3) * * *

(4) * * *

(5) * * *

(6) * * *

(e) *Return.* * * *

(f) *Amendment of Proof of Service.* * * *

(g) *Alternative Provisions for Service in a Foreign Country.*

(1) Manner. Whenever a statute of the United States or an order of court thereunder provides for service of a summons and complaint, or of a notice, or of an order in lieu of a summons and complaint, upon a party not an inhabitant of or found within the United States, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service and service is to be effected upon a party in a foreign country, it is sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to [~~him~~] **the individual** personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dis-

patched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of this court or by the foreign court.

(2) Return. * * *

(h) *Summons and Complaint—Time Limit for Service.* * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; July 21, 1986, eff. Oct. 1, 1986; **July 28, 1988, eff. Nov. 1, 1988.**)

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### *Amendments to Rule 5*

Rule 5 is amended as follows.

Rule 5. Service and Filing of Pleadings and Other Papers

(a) *Service—When Required* * * *

(b) *Service—How Made.* Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party [~~himself~~] is ordered by the court. Service upon the attorney or upon the party shall be made by delivering a copy to [~~him~~] **the attorney or party** or by mailing it to [~~him~~] **the attorney or party** at [~~his~~] **the attorney's or party's** last known address or, if no address is known, by leaving it with the clerk of the court. Delivery is made by; handing a copy to the attorney or to the party; or leaving it at [~~his~~] **the attorney's or party's** office with [~~his~~] **a** clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at [~~his~~] **the person's** dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(c) *Service—Numerous Defendants.* * * *

(d) *Filing—When Required* * * *

(e) *Filing—How Made.* The filing of pleadings and other papers with the court shall be made by filing them with the clerk of the court, except that the judge to whom an action is assigned, or a matter is referred, may permit pleadings and other papers pertaining thereto to be filed with [~~him~~] **the judge** in which event [~~he~~] **the judge** shall note thereon the filing date and forthwith transmit them to the office of the clerk. Filing with the clerk of the court shall be made by delivery or by mailing to: The Clerk of the Court, United States Court of International Trade, One Federal Plaza, New York, New York 10007; or by delivery to the clerk at places

other than New York City when the papers pertain to an action being tried or heard at that place.

(f) *Filing of Summons and Complaint by Mail.* * * *

(g) *Service and Filing—When Completed.* * * *

(h) *Proof of Service.* * * *

PRACTICE COMMENT * * *

PRACTICE COMMENT * * *

PRACTICE COMMENT * * *

PRACTICE COMMENT * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 6*

Rule 6 is amended as follows:

Rule 6. Time

(a) *Computation.* * * *

(b) *Extension.* * * *

(1) * * *

(2) * * *

(3) * * *

(c) *Additional Time After Service by Mail.* Whenever a party has the right or obligation to do some act or take some proceeding within a prescribed period after the service of a pleading, motion, or other paper upon [~~him~~] **the party,** and the service is made by mail, 5 days shall be added to the prescribed period.

(As amended, eff. Jan. 1, 1985; June 19, 1985; eff. Oct. 1, 1985; Apr. 28, 1987, eff. June 1, 1987; **July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 8*

Rule 8 is amended as follows:

Rule 8. General Rules of Pleading

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a de-

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* * * *

mand for judgment for the relief [~~to which he deems himself entitled~~] **the pleader seeks.** Relief in the alternative or of several different types may be demanded.

(b) *New Grounds.* * * *

(c) *Defenses—Form of Denials.* A party shall state in short and plain terms [~~his~~] **the party's** defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If [~~he~~] **a party** is without knowledge or information sufficient to form a belief as to the truth of an averment, [~~he~~] **the party** shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, [~~he~~] **the pleader** shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, [~~he~~] **the pleader** may make [~~his~~] denials as specific denials of designated averments or paragraphs, or [~~he~~] may generally deny all the averments except such designated averments or paragraphs as [~~he~~] **the pleader** expressly admits; but, when [~~he~~] **the pleader** does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, [~~he~~] **the pleader** may do so by general denial subject to the obligations set forth in Rule 11.

(d) *Affirmative Defenses.* * * *

(e) *Effect of Failure to Deny.* * * *

(f) *Pleading to Be Concise and Direct—Consistency.* * * *

(1) * * *

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as [~~he~~] **the party** has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule ll.

(g) *Construction of Pleadings.* * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

### *Amendments to Rule 9*

Rule 9 is amended as follows:

Rule 9. Pleading Special Matters

(a) *Capacity.* It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, [~~he~~] **the party desiring to raise the issue** shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, Mistake, Condition of the Mind.* * * *

(c) *Conditions Precedent.* * * *

(d) *Official Document or Act.* * * *

(e) *Judgment.* * * *

(f) *Time and Place.* * * *

(g) *Special Damage.* * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 11*

Rule 11 is amended as follows:

Rule 11. Signing of Pleadings, Motions and Other Papers—Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in [~~his~~] **the attorney's** individual name, whose address and telephone number shall be stated. Every pleading, motion, or other paper of the United States shall be signed by an attorney authorized to do so on behalf of the Assistant Attorney General, Civil Division, Department of Justice. A pleading, motion, or other paper of an agency of the United States, authorized by statute to represent itself in judicial proceedings, may be signed by an attorney authorized to do on behalf of the agency. A party who is not represented by an attorney shall sign [~~his~~] **the party's** pleading, motion, or other paper and state [~~his~~] **the party's** address and telephone number. Except when otherwise specifically prescribed by rule or statute, pleadings or other papers need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by [~~him~~] **the signer** that [~~he~~] **the signer** has read the pleading, motion, or other paper; that to the best of [~~his~~] **the signer's** knowledge, infor-

mation, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended, eff. Jan. 1, 1987; **July 28, 1988, eff. Nov. 1, 1988.**)

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### *Amendments to Rule 12*

Rule 12 is amended as follows:

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings

(a) *When Presented.* The United States, or an officer or agency thereof, shall serve an answer to the ccmplaint, or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, of the pleading in which the claim is asserted; except that, in an action described in 28 U.S.C. § 1581(f), involving an application for an order to make confidential information available under section 777(c)(2) of the Tariff Act of 1930, the answer shall be served within 10 days after the service of the summons and complaint. For good cause shown, the court in any action [,] may order a different period of time.

Any other defendant shall serve [~~his~~] **an** answer within 20 days after the service of the complaint upon [~~him~~] **that defendant.** A party served with a pleading stating a cross-claim against [~~him~~] **that party** shall serve an answer thereto within 20 days after the service upon [~~him~~] **that party.** The plaintiff shall serve [~~his~~] **a** reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court; (1) if the court denies the motion or postpones its disposi-

tion until the trial on the merits, the responsive pleading shall be served within 10 days after the notice of the court's action; (2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) *How presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) insufficiency of process, (4) insufficiency of service of the summons and complaint, (5) failure to state a claim upon which relief can be granted, (6) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, [~~he~~] **the adverse party** may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside of the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

(c) *Motion for Judgment on the Pleadings.* * * *

(d) *Preliminary Hearings.* * * *

(e) *Motion for More Definite Statement.* If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, [~~he~~] **the party** may move for a more definite statement before interposing [~~he~~] **a** responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) *Motion to Strike.* Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon [~~him~~] **the party** or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of Defenses in Motion.* A party who makes a motion under this rule may join with it any other motions herein provided for and then available to [~~him~~] **the party.** If a party makes a motion under this rule but omits therefrom any defense or objection then available to [~~him~~] **the party** which this rule permits to be raised by motion, [~~he~~] **the party** shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) of this rule on any of the grounds there stated.

(h) *Waiver or Preservation of Certain Defenses.*

(1) * * *
(2) * * *
(3) * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.).**

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### *Amendments to Rule 13*

Rule 13 is amended as follows:

Rule 13. Counterclaim and Cross-Claim

(a) *Counterclaims.* * * *

(b) *Counterclaim Exceeding Opposing Claim.* * * *

(c) *Counterclaim Against the United States.* * * *

(d) *Counterclaim Maturing or Acquired After Pleading.* A claim which either matured or was acquired by the pleader after serving [~~his~~] a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(e) *Omitted Counterclaim.* When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, [~~he~~] **the pleader** may by leave of court set up the counterclaim by amendment.

(f) *Cross-Claim Against Co-Party.* * * *

(g) *Joinder of Additional Parties.* * * *

(h) *Separate Trials—Separate Judgments.* * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

### *Amendments to Rule 14*

Rule 14 is amended as follows:

Rule 14. Third-party Practice

(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to [~~his~~] **the third-party plaintiff** for all or part of the plaintiff's claim against [~~his~~] **the third-party plaintiff.** The third-party plaintiff need not obtain leave to make the service if [~~he~~] **the third-party plaintiff** files the third-party complaint not later than 10 days after [~~he serves his~~] **serving the** original answer. Otherwise [~~he~~] **the third-party plaintiff** must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make [~~him~~] **any** defenses to the third-party plaintiff's claim as provided in Rule 12, and [~~him~~] **any** counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff, if (1) the claim involves the imported merchandise that is the subject matter of the civil action, or (2) the claim is to recover upon a bond or customs duties relating to such merchandise. The plaintiff may assert any claim against the third-party defendant, if (1) the claim involves the imported merchandise that is the subject matter of the civil action, or (2) the claim is to recover upon a bond or customs duties relating to such merchandise, and the third-party defendant thereupon shall assert [~~his~~] **any** defenses as provided in Rule 12 and [~~his~~] **any** counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or for a separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to [~~him~~] **the third-party defendant** for all or part of the claim made in the action against the third-party defendant.

(b) *When Plaintiff May Bring in Third Party.* When a counterclaim is asserted against a plaintiff, [~~he~~] **the plaintiff** may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

### *Amendments to Rule 15*

Rule 15 is amended as follows:

Rule 15. Amended and Supplemental Pleadings

(a) *Amendments.* A party may amend [~~his~~] **the party's** pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been noticed for trial, [~~he~~] **the party** may so amend it at any time within 20 days after it is served. Otherwise a party may amend [~~his~~] **the party's** pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

(b) *Amendments To Conform to the Evidence.* When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice [~~him~~] **the party** in maintaining [~~his~~] **the party's** action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against [~~him,~~] the party to be brought in by amendment, **that party** (1) has received such notice of the institution of the action that [~~he~~] **the party** will not be prejudiced in maintaining [~~his~~] **a** defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against [~~him~~] **the party.** The delivery or mailing of the summons and complaint to the Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, or an agency or officer who would have been a

proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) *Supplemental Pleadings.* Upon motion of a party, the court may, upon reasonable notice and upon such terms as are just, permit [~~him~~] **the party** to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

(As amended, eff. Jan. 1, 1982; **July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 16*

Rule 16 is amended as follows:

Rule 16. postassignment Conferences—Scheduling—Management

(a) *Postassignment Conferences—Objectives.* In any action, the judge to whom the action is assigned may, in [~~his~~] **the** discretion of that judge, direct the attorneys for the parties and any unrepresented parties to appear for a conference or conferences for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the action will not be protracted because of lack of management;

(3) discouraging wasteful activities;

(4) improving the quality of the proceedings for the final disposition of the action through more thorough preparation; and

(5) facilitating the settlement of the action.

(b) *Scheduling and Planning.* * * *

(c) *Subjects to be Discussed at Postassignment Conferences.* * * *

(d) *Final Postassignment Conference.* * * *

(e) *Orders.* * * *

(f) *Sanctions.* If a party or party's attorney fails to obey a scheduling or postassignment conference order, or if no appearance is made on behalf of a party at a scheduling or postassignment conference, or if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or [~~his~~] **the judge's** own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2), (3), and (4). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing [~~him~~] **the party** or both to pay the reasonable expenses incurred because

of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.)**

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***Amendments to Rule 17***

Rule 17 is amended as follows:

Rule 17. Parties Plaintiff and Defendant—Capacity

(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in [~~his~~] **that person's** own name without joining [~~with him~~] the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Capacity To Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of [~~his~~] **the individual's** domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases, capacity to sue or be sued shall be determined by the law of the appropriate state except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by 28 U.S.C. § § 754 and 959(a).

(c) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. [~~If an~~] **An** infant or incompetent person **who** does not have a duly appointed representative [~~, he~~] may sue by **a** [~~his~~] next friend or by a

guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 18*

Rule 18 is amended as follows:
Rule 18. Joinder of Claims and Remedies

(a) *Joinder of Claims.* A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as [~~he~~] **the party** has against an opposing party, except that in an action described in 28 U.S.C. § 1581(a), a party may join claims only if they involve a common issue.

(b) *Joinder of Remedies.* Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to [~~him~~] **that plaintiff,** without first having obtained a judgment establishing the claim for money.

**(As amended, July 28, 1988; eff. Nov. 1, 1988.)**

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### *Amendments to Rule 19*

Rule 19 is amended as follows:
Rule 19. Joinder of Persons Needed for Just Adjudication

(a) *Persons To Be Joined if Feasible.* A person shall be joined as a party in the action if (1) in [~~his~~] **the person's** absence complete relief cannot be accorded among those already parties, or (2) [~~he~~] **the person** claims an interest relating to the subject of the action and is so situated that the disposition of the action in [~~his~~] **the person's** absence may (A) as a practical matter impair or impede [~~his~~] **the person's** ability to protect that interest, or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [~~his~~] **the** claimed interest. If [~~he~~] **the person** has not been so joined, the court shall order that [~~he~~] **the person** be made a party. If [~~he~~] **the**

**person** should join as a plaintiff but refuses to do so, [~~he~~] **the person** may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) *Determination by Court Whenever Joinder Not Feasible.* If a person as described in subdivision (a)(1)–(2) of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judqment rendered in the person's absence might be prejudicial to [~~him~~] **the person** or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* * * *

(d) *Exception of Class Actions.* * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 20*

Rule 20 is amended as follows:

Rule 20. Permissive Joinder of Parties

(a) *Permissive Joinder.*

(b) *Separate Trials.* The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom [~~he~~] **the party** asserts no claim and who asserts no claim against [~~him~~] **the party** and may order separate trials or make other orders to prevent delay or prejudice.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 23*

Rule 23 is amended as follows:

Rule 23. Class Actions

(a) *Prerequisites to a Class Action.* * * *

(b) *Class Actions Maintainable.* * * *

(c) *Determination by Order Whether Class Action To be Maintained—Notice—Judgment—Actions Conducted Partially as Class Actions.*

(1) * * *

(2) In any class action maintained under subdivision (b)(3) of this rule, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude [~~him~~] **the member** from the class if [~~he~~] **the member** so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if [~~he~~] **the member** desires, enter an appearance through [his] counsel.

(3) * * *

(4) * * *

(d) *Orders in Conduct of Actions.* * * *

(e) *Dismissal or Compromise.* * * *

(As amended, eff. Jan. 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

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## *Amendments to Rule 24*

Rule 24 is amended as follows:

Rule 24. Intervention

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of other action and [~~he~~] **the applicant** is so situated that the disposition of the action may as a practical matter impair or impede [~~his~~] **the applicant's** ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* * * *

(c) *Procedure.* * * *

PRACTICE COMMENT: * * *

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

### *Amendments to Rule 25*

Rule 25 is amended as follows:
Rule 25. Substitution of Parties
(a) *Death.* * * *
(1) * * *
(2) * * *
(b) *Incompetency.* If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against [~~his~~] **the party's** representative.
(c) *Transfer of Interest.* * * *
(d) *Public Officers—Death or Separation From Office.*
(1)When a public officer is a party to an action in [~~his~~] **an** official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and [~~his~~] **the officer's** successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.
(2) [~~When a~~] **A** public officer **who** sues or is sued in [~~his~~] **an** official capacity [~~, he~~] may be described as a party by [~~his~~] **the officer's** official title rather than by name: but the court may require [~~his~~] **the officer's** name to be added.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 26*

Rule 26 is amended as follows:
Rule 26. General Provisions Governing Discovery
(a) *Discovery Methods:* * * *
(b) *Discovery Scope and Limits.* * * *
(1) In General. * * *
(2) Insurance Agreements. * * *
(3) Trial Preparation—Materials. Subject to the provisions of paragraph (4) of this subdivision (b), a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subdivision (b) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including [~~his~~] **the other party's** attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of [~~his~~] **the party's** case and that [~~he~~]

**the party** is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(3) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation—Experts. * * *

(c) *Protective Orders.* * * *

(d) *Sequence and Timing of Discovery.* * * *

(e) *Supplementation of Responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement [~~his~~] **the** response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which [~~he~~] **the person** is expected to testify, and the substance of [~~his~~] **the person's** testimony.

(2) A party is under a duty seasonably to amend a prior response if [~~he~~] **the party** obtains information upon the basis of which (A) [~~he~~] **the party** knows that the response was incorrect when made, or (B) [~~he~~] **the party** knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) * * *

(f) *Discovery Conference.* At any time after the filing of a complaint the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and [~~his~~] **each party's** attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a postassignment conference authorized by Rule 16.

(g) *Signing of Discovery Requests, Responses, and Objections.* Every request for discovery or response or objection thereto made by a party represented by an attorney shall he signed by at least one attorney of record in [~~his own name~~] **the attorney's individual** name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state [~~his~~] **the party's** address and telephone number. The signature of the attorney or party constitutes a certification that [~~he~~] **the signer** has read the request, response, or objection, and that to the best of [~~his~~] **the signer's** knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable

expenses incurred because of the violation, including a reasonable attorney's fee.

(h) *Costs.* * * *

(As amended, eff. Jan. 1, 1985; **July 28, 1988. eff. Nov. 1, 1988.**)

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***Amendments to Rule 27***

Rule 27 is amended as follows:

Rule 27. Despositions Before Action or Pending Appeal

(a) *Before Action.*

(1) *Petition.* A person who desires to perpetuate [~~his own~~] testimony [~~or that of aanother person~~] regarding any matter that may be cognizable in this court may file a verified petition. The petition shall be entitled in the name of the petitioner and shall show: (A) that the petitioner expects to be a party to an action cognizable in this court but is presently unable to bring it or cause it to be brought, (B) the subject matter of the expected action and [~~his~~] **the petitioner's** interest therein, (C) the facts which [~~he~~] **the petitioner** desires to establish by the proposed testimony and [~~his~~] **the** reasons for desiring to perpetuate it, (D) the names or a description of the persons [~~he~~] **the petitioner** expects will be adverse parties and their addresses so far as known, and (E) the names and addresses of the persons to be examined and the substance of the testimony which [~~he~~] **the petitioner** expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. * * *

(3) Order and Examination. * * *

(4) Use of Deposition. * * *

(b) *Pending Appeal.* If an appeal has been taken from a judgment or before the taking of an appeal if the time therefor has not expired, the court may allow the taking of depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the court. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take depositions, upon the same notice and service thereof as if the action was pending. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which [~~he~~] **the party** expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character prescribed by Rules 34 and 35, thereupon the depositions may be taken and used in the same manner

and under the same conditions as are prescribed in these rules for depositions taken in actions pending in court.

(c) *Perpetuation by Action.* * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 28*

Rule 28 is amended as follows:

Rule 28. Persons Before Whom Depositions May Be Taken—Commissions and Letters Rogatory

(a) *Within the United States.* * * *

(b) *In Foreign Countries.* In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of [~~his~~] **the** commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory.

(c) *Commissions and Letters Rogatory—How Issued—When Issued—Interrogatories—Objections to Interrogatories.*

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(d) *Commissions and Letters Rogatory—To Whom Issued—Taking of Testimony Use of Testimony.*

(1) * * *

(2) Such ccmmissions or letters rogatory, together with all interrogatories, shall be forwarded by the clerk of the court immediately after the time for filing objections to the last interrogatory has expired, or, if objection is made, immediately after the court's ruling on the last interrogatory becomes final, with directions to proceed promptly to take the testimony of the witness in response to all the interrogatories and to prepare, certify, and return the deposition to the clerk of the court, attaching thereto the commission or letter rogatory and all interrogatories [~~received by him~~].

(3) The answers of each witness under oath to all interrogatories shall be in writing and signed by [~~him~~] **the official commissioned pursuant to paragraph (1) of this subdivision.** The testimony so taken may be used in the same manner as prescribed in Rule 32.

(e) *Return, Notice, Filing of Deposition.* * * *

(f) *Disqualification for Interest.* * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

### *Amendments to Rule 30*

Rule 30 is amended as follows:

Rule 30. Depositions Upon Oral Examination

(a) *When Depositions May Be Taken.* * * *

(b) *Notice of Examination—General Requirements—Special Notice—Nonstenographic Recording—Production of Documents and Things—Deposition of Organization—Deposition by Telephone.*

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify [~~him~~] **the person** or the particular class or group to which [~~he~~] **the person** belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) * * *

(3) * * *

(4) A party may in [~~his~~] **the party's** notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which [~~he~~] **the person** will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(4) does not preclude taking a deposition by any other procedure authorized in these rules.

(5) The parties may stipulate in writing, or the court may upon motion order, that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at [~~his~~] **the party's** own expense. Any objections under subdivision (c) of this rule, any changes made by the witness, [~~his~~] **the witness'** signature identifying the deposition of [~~his~~] **the witness'** own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e) of this rule, and the certification of the officer required by subdivision (f) of this rule shall be set forth in a writing to accompany a deposition recorded by nonstenographic means.

(6) The parties may stipulate in writing, or the court may order, that a deposition be taken by telephone. For the purposes of this rule and Rule 28(a), a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to [~~him~~] **the deponent.**

(7) Leave of court is not required for the taking of a deposition by the plaintiff if the notice (A) states that the person to be examined is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless [~~his~~] **the person's** deposition is taken before expiration of the 30-day period prescribed by subdivision (a) of this rule, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and [~~his~~] **the attorney's** signature constitutes a certification by [~~him~~] **the attorney** that to the best of [~~his~~] **the attorney's** knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when [~~he~~] **the party** was served with notice under this subdivision (b)(7) [~~he~~] **the party** was unable through the exercise of diligence to obtain counsel to represent [~~him~~] **the party** at the taking of the deposition, the deposition may not be used against [~~him~~] **the party.**

(c) *Examination and Cross-Examination—Record of Examination—Oath—Objections:* Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under [~~his~~] **the officer's** direction and in [~~his~~] **the officer's** presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(5) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition: and [~~he~~] **the party taking the deposition** shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) *Motion To Terminate or Limit Examination.* * * *

(e) *Submission to Witness—Changes—Signing.* When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by [~~him~~] **the witness,** unless such examination and reading are waived by the witness and

by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer, with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill or cannot he found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to [~~him~~] **the witness,** the officer shall sign it and state on the record the fact of the waiver, or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though signed, unless, on a motion to suppress under Rule 32(c)(4), the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification and Filing by Officer—Exhibits—Copies—Notice of Filing.*

(1) The officer shall certify on the deposition that the witness was duly sworn by [~~him~~] **the officer** and that the deposition is a true record of the testimony given by the witness. [~~He~~] **The officer** shall then securely seal the deposition in an envelope indorsed with the title of the action and marked: "Deposition of [here insert name and address]" and shall promptly file it with the clerk of the court or send it by registered or certified mail to the clerk for filing and give prompt notice of its filing to the party taking the deposition.

Documents and things produced for inspection during the examination of the witness, shall, upon request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them [~~he~~] **the person** may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if [~~he~~] **the person** affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) * * *

(3) * * *

(g) *Failure to Attend or to Serve Subpoena—Expenses.*

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by [~~him~~] **that party** and [~~his~~] **that party's** attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon [~~him~~] **the witness** and the witness because of such failure does not attend, and if another party attends in person or by attorney because [~~he~~] **that party** expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by [~~him~~] **that party** and [~~his~~] **that party's** attorney in attending, including reasonable attorney's fees.

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

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***Amendments to Rule 31***

Rule 31 is amended as follows:

Rule 31. Deposition Upon Written Questions

(a) *Serving Questions—Notice.* After service of the complaint, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify [~~him~~] **the person** or the particular class or group to which [~~he~~] **the person** belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(4).

* * * * * * *

(b) *Officer To Take Responses and Prepare Record.* A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e) and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by [~~him~~] **the officer.**

(c) *Notice of Filing.* * * *

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

### *Amendments to Rule 32*

Rule 32 is amended as follows:

Rule 32. Use of Depositions in Court Proceedings'

(a) *Use of Depositions.* * * *

(1) * * *

(2) * * *

(3) * * *

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require [~~him~~] **the officer** to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

* * * * * * *

(b) *Objections to Admissibility.* * * *

(c) *Effect of Errors and Irregularities in Depositions.* * * *

(1) * * *

(2) * * *

(3) * * *

(4) * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 34*

Rule 34 is amended as follows:

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection Other Purposes

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on [~~his~~] **the requestor's** behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* * * *

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.)**

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* * * *

### *Amendments to Rule 35*

Rule 35 is amended as follows:

Rule 35. Physical and Mental Examination of Persons

(a) *Order for Examination.* When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in [~~his~~] **the party's** custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of Examining Physician.*

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to [~~him~~] **the requestor** a copy of a detailed written report of the examining physician setting out [~~his~~] **the physician's**findings, including the results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that [~~he~~] **such party** is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just; and if a physician fails or refuses to make a report, the court may exclude [~~his~~] **the physician's** testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege [~~he~~] **the party** may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine [~~him~~] **the party** in respect of the same mental or physical condition.

(3) * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 36*

Rule 36 is amended as follows:

* * * * * * *

(a) *Request for Admission.* * * *

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or with such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or [~~his~~] **the party's** attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon [~~him~~] **that defendant.** If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify [~~his~~] **an** answer or deny only a part of the matter of which an admission is requested, [~~he~~] **the party** shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless [~~he~~] **the party** states that [~~he~~] **the party** has made reasonable inquiry and that the information known or readily obtainable by [~~him~~] **the party** is insufficient to enable [~~him~~] **the party** to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; [~~he~~] **the party** may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why [~~he~~] **the party** cannot admit or deny it.

* * * * * * *

(b) *Effect of Admission.* Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a postassignment scheduling or conference order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice [~~him~~] **that party** in maintaining [~~his~~] **the** action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission [~~by him~~] for any other purpose nor may it be used against [~~him~~] **the party** in any other proceeding.

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

## *Amendments to Rule 37*

Rule 37 is amended as follows:

Rule 37. Failure To Make or Cooperate in Discovery—Sanctions

(a) *Motion for Order Compelling Discovery.* * * *

(1) Motion. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(4) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before [~~he applies~~] **applying** for an order.

* * * * * * *

(2) Evasive or Incomplete Answer. * * *

(3) Award of Expenses of Motion. * * *

(b) *Failure To Comply With Order.* * * *

(1) * * *

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting [~~him~~] **that party** from introducing designated matters in evidence.

(3) * * *

(4) * * *

(5) Where a party has failed to comply with an order under Rule 35(a) requiring [~~him~~] **that party** to produce another for examination, such orders as are listed in paragraphs (1), (2) and (3) of this subdivision (b), unless the party failing to comply shows that [~~he~~] **that party** is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising [~~him~~] **that party** or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, [~~he~~] **the requesting party** may apply to the court for an order requiring the other party to pay [~~him~~] the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to

admit had reasonable ground to believe that [~~he~~] **the party** might prevail on the matter, or (4) there was no good reason for the failure to admit.

(d) *Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(4) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take [~~his~~] **the** deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions (b)(l), (b)(2) and (b)(3) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising [~~him~~] **that party** or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

* * * * * * *

(e) *Subpoena of Person in Foreign Country.* * * *

(f) *Failure to Participate in the Framing of a Discovery Plan.* If a party or [~~his~~] **a party's** attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or [~~his~~] attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

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### *Amendments to Rule 38*

Rule 38 is amended as follows:

Rule 38. Jury Trial of Right

(a) *Right Preserved.* * * *

(b) *Demand.* * * *

(c) *Demand—Specification of Issues.* In [~~his~~] **the** demand a party may specify the issues which [~~he~~] **the party** wishes so tried; otherwise [~~he~~] the party shall be deemed to have demanded trial by jury for all the issues so triable. If [~~he~~] **the party** has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) *Waiver.* The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by [~~him~~] **the party** of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(As amended, eff. Jan. 1, 1983; **July 28, 1988, eff. Nov. 1, 1988.**)

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***Amendments to Rule 41***

Rule 41 is amended as follows:

Rule 41. Dismissal of Actions

(a) *Voluntary Dismissal—Effect Thereof.*

(1) *By Plaintiff—By Stipulation.* * * *

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision (a), an action shall not be dismissed by the plaintiff unless upon order of the court, and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon [~~him~~] **the defendant** of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) *Involuntary Dismissal—Effect Thereof.*

(1) * * *

(2) * * *

(3) * * *

(4) * * *

(c) *Insufficiency of Evidence.* After the plaintiff, in an action tried by the court without a jury, has completed the presentation of [~~his~~] evidence, the defendant, without waiving [~~his~~] **the** right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the judgment shall be supported by either a statement of findings of fact and conclusions of law or an opinion stating the reasons and facts upon which the judgment is based. A dismissal under this subdivision (c) operates as a dismissal upon the merits, unless the court otherwise directs.

(d) *Dismissal of Counterclaim, Cross-Claim, or Third Party Claim.*

* * *

(e) *Costs of previously Dismissed Action.* * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 43*

Rule 43 is amended as follows:
Rule 43. Taking of Testimony *
(a) *Form.* * * *
(b) *Affirmation in Lieu of Oath.* * * *
(c) *Evidence on Motions.* * * *
(d) *Interpreters.* The court may appoint an interpreter of its own selection and may fix [~~his~~] **the interpreter's** reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.
(e) *Documents Specially Admissible.*
(1) Reports—Depositions—Affidavits. * * *
(2) Service. A copy of any report, deposition or affidavit described in paragraph (1) of this subdivision (e), which is intended to be offered in evidence, shall be served on the opposing party with the request for trial. A party other than the party serving the request for trial shall serve a copy of any report, deposition or affidavit which [~~he~~] **that party** intends to offer in evidence upon the opposing party within 15 days after service of the request for trial. Timely service of copies of such documents may be waived or the time extended upon consent, or by order of the court for good cause shown.
(3) Objections. * * *
(4) Pricelists-Catalogs * * *

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 44*

Rule 44 is amended as follows:
Rule 44. Proof of Official Record
(a) *Authentication.*
(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein,

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* * * *

when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by [~~his~~] **the officer's** deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of [~~his~~] **the officer's** office.

(2) Foreign. * * *

(b) *Lack of Record.* * * *

(c) *Other proof.* * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendment to Rule 44.1*

Rule 44.1 is amended as follows:

Rule 44.1. Determination of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice [~~in his~~] **by** pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 45*

Rule 45 is amended as follows:

Rule 45. Subpoena

(a) *For Attendance of Witnesses—Form—Issuance.* * * *

(b) *For Production of Documentary Evidence.* * * *

(c) *Service.* A subpoena may be served by a United States marshal, by [~~his~~] **a deputy marshal,** or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to [~~him~~] **that person** the fees for one day's attendance and the mileage allowed by law. When

the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered.

(d) *Subpoena for Taking Depositions—Place of Examination.*

(1) * * *

(2) * * *

(e) *Subpoena for a Hearing or Trial.*

(1) * * *

(2) * * *

(f) *Contempt.* Failure by any person without adequate excuse to obey a subpoena served upon [~~him~~] **that person** may be deemed a contempt of court.

(As amended, eff. Oct. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

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### *Amendments to Rule 46*

Rule 46 is amended as follows:.

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which [~~he~~] **the party** desires the court to take or [~~his~~] **the party's** objection to the action of the court and [~~his~~] **the** grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice [~~him~~] **the party.**

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 49*

Rule 49 is amended as follows:

Rule 49. Special Verdicts and Interrogatories

(a) *Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the

matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives [~~his~~] **the** right to a trial by jury of the issue so omitted unless before the jury retires [~~he~~] **the party** demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding: or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) *General Verdict Accompanied by Answer to Interrogatories.* * * *

**(As amended. July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 50*

Rule 50 is amended as follows:

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) *Motion for Directed Verdict—When Made—Effect.* * * *

(b) *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 30 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with [~~his~~] **the party's** motion for a directed verdict; or if a verdict was not returned, such party, within 10 days after the jury has been discharged, may move for judgment in accordance with [~~his~~] **the party's** motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Motion for Judgment Notwithstanding the Verdict—Conditional Rulings on Grant of Motion.*

(1) * * *

(2) * * *

(d) *Motion for Judgment Notwithstanding the Verdict—Denial of Motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee,

assert grounds entitling [~~him~~] **the party** to a new trial in the event the appellate court concludes that this court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing this court to determine whether a new trial shall be granted.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 51*

Rule 51 is amended as follows:
Rule 51. Instructions to Jury—Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury [~~, but the court shall instruct the jury after the arguments are completed~~]. **The court, at its election, may instruct the jury before or after argument, or both.** No party may assign as error the giving or the failure to give an instruction unless [~~he~~] **that party** objects thereto before the jury retires to consider its verdict, stating distinctly the matter **objected** to [~~which he objects~~] and the grounds of [~~his~~] **the** objection. Opportunity shall be given to make the objection out of the hearing of the jury.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 53*

Rule 53 is amended as follows:
Rule 53. Masters

(a) *Appointment and Compensation.* The court, with the concurrence of a majority of all the judges, may appoint one or more standing masters; and a judge, to whom an action is assigned, may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action which is in the custody and control of the court, as the court may direct.

The master shall not retain [~~his~~] **the master's** report as security for [~~his~~] **the master's** compensation, but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) *Reference.* * * *

(c) *Powers.* The order of reference to the master may specify or limit [~~his~~] **the master's** powers and may direct [~~him~~] **the master** to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before [~~him~~] **the master** and to do all acts and take all measures necessary or proper for the efficient performance of [~~his~~] **the master's** duties under the order. [~~He~~] **The master** may require the production before [~~him~~] **the master** of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. [~~He~~] **The master** may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may [~~himself~~] examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) *Proceedings.*

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make [~~his~~] **the** report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in [~~his~~] **the master's** discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, [~~he~~] **the witness** may be punished as for a contempt and be subject to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, [~~he~~] **the master** may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as [~~he~~] **the master** directs.

(e) *Report.*

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to [~~him~~] **the master** by the order of reference and, if required to make findings of fact and conclusions of law, [~~he~~] **the master** shall set them forth in the report. [~~He~~] **The master** shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In Non-Jury Actions. * * *

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. [~~His~~] **The master's** findings upon the issues submitted to [~~him~~] **the master** are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. * * *

(5) Draft Report. Before filing [~~his~~] **the master's** report, a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

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### *Amendments to Rule 54*

Rule 54 is amended as follows:

Rule 54. Judgments

(a) *Definition—Form.* * * *

(b) *Judgment Upon Multiple Claims or Involving Multiple Actions.* * * *

(c) *Demand for judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to

which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in [~~his~~] **the party's** pleadings.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 55*

Rule 55 is amended as follows:

Rule 55. Default

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as prescribed by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter [~~his~~] **the party's** default.

(b) *Judgment.* Judgment by default may be entered as follows:

In all cases the party entitled to a judgment by default shall apply to the court therefor.

When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the court upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount against the defendant, if [~~he~~] **the defendant** has been defaulted for failure to appear and [~~if he~~] is not an infant or incompetent person.

If the party against whom judgment by default is sought has appeared in the action, [~~he~~] **the party** (or, if appearing by representative, [~~his~~] **the party's** representative) shall be served with 10-days written notice of the application for judgment. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) *Setting Aside Default.* * * *

(d) *Plaintiffs, Counterclaimants, Cross-Claimants.* * * *

(e) *Judgment Against the United States.* No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes [~~his~~] **a** claim or right to relief by evidence satisfactory to the court.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

## *Amendments to Rule 56*

Rule 56 is amended as follows:

Rule 56. Summary Judgment

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim or cross-claim, or to obtain a declaratory judgement, may, at any time after the expiration of the initial time within which to file an answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in [~~his~~] **the party's** favor upon all or any part thereof.

(b) *For Defending Party.* A party whom a claim, counterclaim or cross-claim is asserted, or a declaratory judgment is sought, may, at any time after the filing of a complaint, move with or without supporting affidavits for a summary judgment in [~~his~~] **the party's** favor as to all or any part thereof.

(c) *When Leave is Required.* * * *

(d) *Motion and Proceedings Thereon.* * * *

(e) *Case Not Fully Adjudicated on Motion.* * * *

(f) *Form of Affidavits—Further Testimony—Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith, except that all papers and documents which are part of the official record of the action pursuant to Title IX of these rules may be referred to in an affidavit without attaching copies, and shall be considered by the court without additional certification. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of [~~his~~] **the adverse party's** pleading, but [~~his~~] **the adverse party's** response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If [~~he~~] **the adverse party** does not so respond, summary judgment, is appropriate, shall be entered against [~~him~~] **the adverse party.**

(g) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that [~~he~~] **the party** cannot for reasons stated present by affidavit facts essential to justify [~~his~~] **the party's** opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented

pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused [~~him~~] **the other party** to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(i) *Annexation of Statement.* * * *

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

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### *Amendments to Rule 60*

Rule 60 is amended as follows:

Rule 60, Relief From Judgment or Order

(a) *Clerical Mistakes.* * * *

(b) *Mistakes, Inadvertence, Excusable Neglect—Newly Discovered Evidence—Fraud, Etc.* On motion of a party or upon its own initiative and upon such terms as are just, the court may relieve a party or [~~his~~] **a party's** legal representative from a final judgement, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgement should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

This rule does not limit the power of the court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in 28 U.S.C. § 1655, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended, eff. Jan. 1, 1985; July 21, 1986, eff. Oct. 1, 1986; **July 28, 1988, eff. Nov. 1, 1988.**)

### *Amendments to Rule 62*

Rule 62 is amended as follows:

Rule 62. Stay of Proceedings To Enforce a Judgment

(a) *Automatic Stay—Exception—Injunctions.* * * *

(b) *Stay on Motion for New Trial or Rehearing, or for Judgment.* * * *

(c) *Injunction Pending Appeal.* * * *

(d) *Stay Upon Appeal.* * * *

(e) *Stay in Favor of the United States or Agency Thereof.* * * *

(f) *Stay According to State Law.* In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled to such stay as would be accorded [~~him~~] **the judgment debtor** had the action been maintained in the courts of that state.

(g) *Stay of Judgment as to Multiple Claims or Multiple Parties.* * * *

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1985; July 21, 1986, eff. Oct. 1, 1986; July 28, 1988, eff. Nov. 1, 1988.)

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### *Amendments to Rule 63*

Rule 63 is amended as follows:

Rule 63. Contempt

A proceeding to adjudicate a person in civil contempt of court, including a case provided for in Rule 37(b), shall be commenced by the service of a motion or order to show cause. The affidavit upon which the motion or order to show cause is based shall set out with particularity the misconduct complained of, the claim, if any, for damages occasioned thereby, and such evidence as to the amount of damages as may be available to the moving party. A reasonable counsel fee, necessitated by the contempt proceeding, may be included as an item of damage. Where the alleged contemnor has appeared in the action by an attorney, the notice of motion or order to show cause and the papers upon which it is based may be served upon the [~~his~~] **contemnor's** attorney; otherwise service shall be made personally, in the manner provided for the service of a complaint. If an order to show cause is sought, such order, may upon necessity shown therefor, embody a direction to a United States marshal to arrest the alleged contemnor and hold him in bail in an amount fixed by the order, conditioned for [~~his~~] **the contemnor's** appearance at the hearing, and further conditioned that the alleged contemnor will [~~hold himself~~] **be** thereafter amenable to all orders of the court for [~~his~~] surrender.

If the alleged contemnor puts in issue [~~his~~] **the** alleged misconduct or the damages thereby occasioned, [~~he~~] **the alleged contemnor** shall, upon demand therefor, be entitled to have oral evidence taken thereon, either before the court or before a master appointed by the court. When by law such alleged contemnor is entitled to a trial by jury, [~~he~~] **the alleged contemnor** shall make written demand therefor on or before the return day or adjourned day of the application; otherwise [~~he~~] **the alleged contemnor** will be deemed to have waived a trial by jury.

In the event the alleged contemnor is found to be in contempt of court, an order shall be made and entered (1) reciting or referring to the verdict or findings of fact upon which the adjudication is based; (2) setting forth the amount of the damages to which the complainant is entitled; (3) fixing the fine, if any, imposed by the court, which fine shall include the damages found, and naming the person to whom such fine shall be payable; (4) stating any other conditions, the performance whereof will operate to purge the contempt; and (5) directing the arrest of the contemnor by a United States marshal, and [~~his~~] confinement until the performance of the condition fixed in the order and the payment of the fine, or until the contemnor be otherwise discharged pursuant to law. The order shall specify the place of confinement. No party shall be required to pay or to advance to the marshal any expenses for the upkeep of the prisoner. Upon such an order, no person shall be detained in prison by reason of nonpayment of the fine for a period exceeding 6 months. A certified copy of the order committing the contemnor shall be sufficient warrant to the marshal for the arrest and confinement. The aggrieved party shall also have the same remedies against the property of the contemnor as if the order awarding the fine were a final judgment.

In the event the alleged contemnor shall be found not guilty of the charges [~~made against him~~], **the alleged contemnor** shall be discharged from the proceeding.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 65*

Rule 65 is amended as follows:

Rule 65. Injunctions

(a) *Preliminary Injunction.*

(1) Notice. * * *

(2) Consolidation of Hearing With Trial on Merits. * * *

(b) *Temporary Restraining Order—Notice—Hearing—Duration.* A temporary restraining order may be granted without written or

oral notice to the adverse party or [~~his~~] **that party's** attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or [~~his~~] **that party's** attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting [~~his~~] **the** claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if [~~he~~] **the party** does not do so, the court shall dissolve the temporary restraining order. On 2-days notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) *Security.* * * *

(d) *Form and Scope of Injunction or Restraining Order.* * * *

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 65.1*

Rule 65.1 is amended as follows:

Rule 65.1. Security—Proceedings Against Sureties

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits [~~himself~~] to the jurisdiction of the court and irrevocably appoints the clerk of the court as [~~his~~] **the surety's** agent upon whom any papers affecting [~~his~~] **the surety's** liability on the bond or undertak-

ing may be served. [~~His~~] **The surety's** liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known. The bond, stipulation, or other undertaking must be secured by a corporate surety holding a certificate of authority from the Secretary of the Treasury. Except as otherwise provided by law, where the amount has been fixed by a judge, all bonds, stipulations, or other undertakings, shall be approved by the judge.

PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1982; **July 28, 1988, eff. Nov. 1. 1988.)**

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***Amendments to Rule 69***

Rule 69 has been amended as follows:

Rule 69. Execution

(a) *In General.* Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which execution is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of judgment or execution, the judgment creditor or [~~his~~] **a** successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules, or in the manner provided by the practice of the state in which execution is sought.

(b) *Against Certain Public Officers.* When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in 28 U.S.C. § 2006, and when the court has given the certificate of probable cause for [~~his~~] **the officer's** act as provided in that statute, execution shall not issue against the officer or [~~his~~] **the officer's** property but the final judgment shall be satisfied as provided in such statute.

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

### *Amendments to Rule 71*

Rule 71 is amended as follows:

Rule 71. Documents in an Action Described in 28 U.S.C. § 1581(c) or (f)

(a) *Actions Described in 28 U.S.C. § 1581(c).* * * *

(1) * * *

(2) * * *

(3) * * *

(b) *Alternative Procedure in an Action Described in 28 U.S.C.* § 1581(c). * * *

(1) * * *

(2) * * *

(3) * * *

(c) *Confidential or Privileged Information in an Action Described in 28 U.S.C. § 1581(c).* * * *

(d) *Documents in an Action Described in 28 U.S.C. § 1581(f).* * * *

(e) *Documents Filed—Copies.* * * *

(f) *Filing of the Record With the Clerk of the Court—What Constitutes.* * * *

**PRACTICE COMMENT: The court has established Security Procedures for Safeguarding Confidential Information in the Custody and Control of the Clerk. These procedures apply to confidential information or privileged information received by the court and may include: trade secrets, commercial or financial information, and information provided to the United States by foreign governments or foreign businesses or persons. These procedures do not pertain to national security information.**

**Section 11(a) of Security Procedures regulates the transmittal of confidential information to and from the clerk by government agencies and private parties. A copy of Section 11(a) is available upon request from, and is posted in, the Office of the Clerk.**

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 74*

Rule 74 is amended as follows:

Rule 74. Admission to Practice*

(a) *Qualifications.* * * *

(b) *Procedure.* * * *

(1) * * *

(2) * * *

(3) * * *

(c) *Admission of Foreign Attorneys.* An attorney, barrister, or advocate who is qualified to practice at the bar of the court of any foreign state which extends a like privilege to members of the bar of this court may be specially admitted for purposes limited to a particular action. [~~He~~] **The applicant** shall not, however, be authorized to act as attorney of record. In the case of such an applicant, the oath shall not be required and there shall be no fee. Such admission shall be granted only on motion of a member of the bar of this court.

(d) *Pro Hac Vice Applications.* An attorney who is eligible for admission to practice under subdivision (a) of this rule, and who has been retained to appear in a particular action by a legal services program may, upon written application and in the discretion of the court, be permitted to specially appear and participate in the particular action. A **pro hac vice** applicant shall state under penalty of perjury (i) the attorney's residence and office address, (ii) the court to which the applicant has been admitted to practice and the date of admission thereof, (iii) that the applicant is in good standing and eligible to practice in said court, (iv) that the applicant is not currently suspended or disbarred in any other court, and (v) if the applicant has concurrently or within the year preceding the current application made any pro hac vice application to this court, the title and the number of each action wherein such application was made, the date of the application, and whether or not the application was granted. If the **pro hac vice** application is granted, the attorney is subject to the jurisdiction of the court with respect to [~~his~~] **the attorney's** conduct to the same extent as a member of the bar of this court, and no application fee is required.

(e) *Disbarment or Other Disciplinary Action.*

(1) Initiation of Proceedings. * * *

(A) that [~~he~~] **the attorney** has resigned from the bar of the Supreme Court of the United States or any other federal court, or from any court of record of any state, territory, or possession;

(B) * * *

(C) * * *

(D) * * * * * *

(2) Sufficiency. The chief judge shall preliminarily examine such certificate or complaint and rule upon its sufficiency prima facie. If [~~he~~] **the chief judge** deems the facts insufficient on their face to warrant disciplinary action, [~~he~~] **the chief judge** shall so advise the complainant and the attorney named.

(3) Investigation and Prosecution. Where the certificate or complaint is deemed sufficient prima facie, the chief judge shall appoint a committee, consisting of three members of the bar of this court, to which the certificate or complaint shall be referred. It shall then be the duty of the committee to investigate the facts involved in such resignation, disbarment or suspension from practice or other facts

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* * * *

alleged in the certificate or complaint. If, in the committee's judgment, probable cause for disbarment, suspension, or disciplinary action exists, it shall then be the duty of the committee to proceed against the attorney by an order signed by the chief judge setting forth the charges against [~~him~~] **the attorney** and requiring [~~him~~] **the attorney,** within 30 days after service of the order upon [~~him~~] **the attorney** by delivery or by registered certified mail, return receipt requested, to show cause as to why disciplinary action should not be taken.

(4) Appearance. The attorney named in the order to show cause may appear in person and may be represented by an attorney and shall have the right to file any answer which, in [~~his~~] **the attorney's** opinion, the proceedings may warrant.

(5) Hearing and Report. * * *

(6) Action by the Court. * * *

(As amended, eff. Jan. 1, 1982; Oct. 3, 1984, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1. 1988.**)

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***Amendments to Rule 75***

Rule 75 is amended as follows:

Rule 75. Practice—Appearance—Substitution of Attorneys—Withdrawal of Attorney

(a) *Practice.* * * *

(b) *Appearances.*

(1) [~~Except where an individual represents himself in ana action, there shall be an attorney of record for a party.~~] **Except for an individual (not a corporation, partnership, organization or other legal entity) appearing pro se, each party and amicus curiae must appear through an attorney authorized to practice before the court.** If a summons, pleading or other paper provided for in these rules bears the name, address and telephone number of a member of the bar of this court, [~~he~~] **the attorney** shall be recognized as the attorney of record and no separate notice of appearance shall be required of [~~him~~] **the attorney.** Provided, however, that an attorney representing the United States, or an agency or officer thereof, who is not otherwise admitted to practice before the court, shall serve a separate notice of appearance as prescribed by paragraph (2) of this subdivision (b).

(2) * * *

(c) *Substitution of Attorneys.* A party who desires to substitute an attorney may do so by serving a notice of substitution upon the prior attorney of record and the other parties. The notice shall be substantially in the form as set forth in Form 12 of the Appendix of Forms. If the prior attorney of record wishes to be heard by the

court on the substitution, [~~he~~] **that attorney** may, by motion, request such relief as [~~he~~] **the attorney** deems appropriate.

(d) *Withdrawal of Attorney.* An attorney of record may withdraw [~~his~~] **an** appearance only by order of the court, upon motion served upon [~~his~~] **the attorney's** client and the other parties.

(e) *Notification of Changes.* Whenever there is any change in the name of an attorney of record, [~~his~~] **the attorney's** address or telephone number, prompt written notice shall be served upon the other parties.

PRACTICE COMMENT: * * *

(As amended July 21, 1986, eff. Oct. 1, 1986; **July 28, 1988, eff. Nov. 1, 1988**).

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***Amendments to Rule 77***

Rule 77 is amended as follows:

Rule 77. Sessions of the Court

(a) *Court Always Open.* * * *

(b) *Trials and proceedings—Orders in Chambers.* * * *

(c) *Place of Trials or Hearings.*

(1) In New York City. * * *

(2) Other Than New York City. * * *

(3) Foreign Countries. * * *

(d) *Photography, Tape Recording and Broadcasting.*

(e) *Assignment and Reassignment of Actions.*

(1) Assignment to Single Judge. * * *

(2) Assignment to Three-Judge Panel. An action may be assigned by the chief judge to a three-judge panel either upon motion, or upon [~~his~~] **the chief judge's** own initiative, when the chief judge finds that the action raises an issue of the constitutionality of an Act of Congress, a proclamation of the President, or an Executive order: or has broad [~~and~~] or significant implications in the administration or interpretation of the law.

(3) Time of Assignment. Actions shall be assigned by the chief judge as follows: in an action commenced under 28 U.S.C. § 1581 (a) or (b), upon a request for trial or submission of a dispositive motion: in all other actions, upon joinder of issue or submission of a dispositive motion: in any action, at any time, upon motion for good cause shown or upon [~~his~~] **the chief judge's** own initiative.

(4) Reassignment. * * *

(5) Disability of a Judge. If by reason of death, sickness or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of facts and conclusions of law

are filed, then the action may be reassigned by the chief judge to another judge who may perform those duties; but if the other judge is satisfied that [~~he~~] **such other judge** annot perform those duties because [~~he~~] **such other judge** did not preside at the trial or for any other reason, [~~he~~] **such other judge** may in [~~his~~] **such other judge's** discretion grant a new trial.

(f) *Judge and Court—Defined.* * * *

PRACTICE COMMENT: * * *

(As amended, Apr. 28, 1987, eff. June 1, 1987; **July 28, 1988, eff. Nov. 1, 1988.**)

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### *Amendments to Rule 80*

Rule 80 is amended as follows:

Rule 80. Papers, Exhibits and Other Material

(a) *Custody and Control.* All papers, exhibits and other material filed with or transmitted to the court shall be retained by the clerk of the court, under **the clerk's** [~~his~~] custody and control except when required by the court. When requested by an attorney for a party, papers, exhibits and other material may be transmitted by the clerk to an appropriate customs officer. Notice of the request shall be given to all other parties by the party filing the request.

(b) *Inspection.* * * *

(c) *Withdrawal.*

(1) Any person may withdraw the papers, exhibits and other material, which **that person** [~~he~~] is authorized to inspect as prescribed in subdivision (b) of this rule, to a designated place in the court. The papers, exhibits and other material shall be returned to the office of the clerk no later than the close of business on the day of withdrawal. Upon request of a party, the clerk may permit papers, exhibits and other material to be withdrawn to a designated place in the offices of the Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, for not more than 30 days, provided that they shall be returned immediately to the office of the clerk upon notice from the clerk.

(2) Whenever any person withdraws papers, exhibits and other material, **that person** [~~he~~] shall sign and leave with the clerk a receipt describing what has been withdrawn.

(d) *Return and Removal.* When a judgment or order of the court has become final, papers, exhibits, and other material transmitted to the court pursuant to 28 U.S.C. § 2635, shall be returned by the clerk, together with a copy of the judgment or order, to the agency from which they were transmitted. All exhibits shall be removed from the custody of the clerk by the party who filed them within 60 days after the judgment or order of the court has become final. A

party who fails to comply with this requirement shall be notified by the clerk that, if the exhibits are not removed within 30 days after the date of the notice, the clerk may dispose of them as **the clerk** [~~he~~] may see fit. Any expense or cost pertaining to the removal of exhibits as prescribed by this rule shall be borne by the party who filed them.

[~~(e) *Photostatic Copies.* The clerk shall receive a fee of 50 cents, payable in advance, for a photostatic copy of each side of a paper. Photostatic copies of a paper may be given to any person who is authorized to inspect that paper as prescribed in subdivision (b) of this rule.~~]

[~~(f)~~] **(e)** *Reporting of Proceedings.* Each session of the court and every other proceeding designated 6y order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, as prescribed by regulations promulgated by the Judicial Conference of the United States and subject to the discretion and approval of the judge. proceedings to be recorded include: all proceedings in open court unless the parties, with the approval of the judge, shall agree specifically to the contrary: and such other proceedings as a judge may direct, or as may be required by rule or order of the court, or as may be requested by any party to the proceeding. The court reporter or other individual designated to produce the record shall attach **an** [~~his~~] official certificate to the original shorthand notes or other original records so taken and promptly file them with , the clerk of the court who shall preserve them in the public records of the court for not less than ten years.

[~~(g)~~] **(f)** *Transcript of Proceedings.* The court reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by rule or order of the court or direction of a judge. Upon the request of any party to the proceeding which has been so recorded, who has agreed to pay the fee therefor, or of a judge of the court, the court reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript **an** [~~his~~] official certificate, and deliver the certified transcript to the clerk of the court for the public records of the court. The certified transcript in the Office of the Clerk shall be open during office hours to inspection by any person without charge, except where restricted by statute or order of the court.

[~~(h) *Fees for Transcripts.* The clerk of the court may charge and collect fees for transcripts requested by the parties, including the United States, in accordance with the rates prescribed by the Judicial Conference of the United States. The clerk of the court may require any party requesting a transcript to prepay the estimated fee in advance except for transcripts that are to be paid for by the United States.~~]

**(g) *Fees.***

**Except as otherwise provided by these rules, the clerk shall collect in advance from the parties such fees for services as are consistent with the "Judicial Conference Schedule of Additional Fees for the United States District Courts."**

**(1) *Reproductions.* Reproductions of original records may be given to any person who is authorized to inspect original records as prescribed in subdivision (b) of this rule.**

**(2) *Transcripts.* The clerk of the court may require any party requesting a transcript to prepay the estimated fee in advance except for transcripts that are to he paid for by the United States.**

**[~~PRACTICE COMMENT: From time to time, the Judicial Conference of the United States establishes maximum rates per page for ordinary, expedited, daily, and hourly transcripts. The rates applicable at any time are available upon request from, and are posted in, the Office of the Clerk.~~]**

**PRACTICE COMMENT: From time to time, the Judicial Conference of the United States establishes fees for services performed by the clerk. The rates applicable at any time are available, upon request, from and are posted in the Office of the Clerk.**

**(As amended, July 28, 1988, eff. Nov. 1, 1988.)**

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### *Amendments to Rule 81*

Rule 81 is amended as follows:

Rule 81. Papers Filed—Conformity—Form, Size, Copies

(a) *Conformity Required.* * * *
(b) *Means of Production.* * * *
(c) *Caption and Signing.* * * *
(d) *Numbering of Pages.* * * *
(e) *Designation of Originals.* * * *
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**PRACTICE COMMENT: The court has established Security Procedures for Safeguarding Confidential Information in the Custody and Control of the Clerk. These procedures apply to confidential information or privileged information received by the court and may include: trade secrets, commercial or financial information, and information provide to the United States by foreign governments or foreign businesses or person. These procedures do not pertain to national security information.**

**Section 11(a) of the Security Procedures regulates the transmittal of private parties. A copy of Section 11(a) is available upon request from, and is posted in, the Office of the Clerk.**

(As amended, eff. Jan. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

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***Amendments to Rule 82***

Rule 82 is amended as follows:
Rule 82. Clerk's Office and Orders by the Clerk
(a) *Business Hours and Address.* * * *
(b) *Motions, Orders and Judgments.* The clerk may dispose of the following types of motions and sign the following types of orders and judgments without submission to the court, but [~~his~~] **the clerk's** action may be suspended, altered or rescinded by the court for good cause shown:

(1) * * *
(2) * * *
(3) * * *
(4) * * *
(5) * * *
(c) *Clerk—Definition.* * * *
(d) *Filing of Papers.* * * *
PRACTICE COMMENT: * * *

(As amended, eff. Jan. 1, 1985; June 19, 1985, eff. Oct. 1, 1985; **July 28, 1988, eff. Nov. 1, 1988.**)

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***Amendments to Rule 89***

Rule 89 is amended as follows:
Rule 89. Effective Date
(a) *Effective Date of Original Rules.* * * *
(b) *Effective Date of Amendments.* * * *
(c) *Effective Date of Amendment.* * * *
(d) *Effective Date of Amendments.* * * *
(1) * * *
(2) * * *
(e) *Effective Date of Amendments.* * * *
(f) *Effective Date of Amendments.* * * *
(g) *Effective Date of Amendments.* * * *
(h) *Effective Date of Amendments.* * * *
**(i) *Effective Date of Amendments.* The amendments adopted by the court on July 28, 1988, shall take effect on November 1, 1988. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent in the opinion of the court their application in a particular motion pending when the amendments take effect would not he feasible or would work injustice, in which event the former procedure applies.**

(As added, eff. Jan. 1, 1985; as amended, June 19, 1985, eff. Oct. 1, 1985; July 21, 1986, eff. Oct. 1, 1986; Dec. 3, 1986, eff. Mar. 1, 1987; Apr. 28, 1987, eff. June 1, 1987; **July 28, 1988, eff. Nov. 1, 1988.**)

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*U.S. G.P.O. 1988-201-627:80005

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